Filed 4/6/10 P. v. Watson CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTWAIN WATSON, Defendant and Appellant.	H033346 (Monterey County Super. Ct. No. SS072720)

A jury convicted defendant Antwain Watson of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) (count 1) and possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)) (count 2). He admitted having served two separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)). The trial court sentenced him to five years in state prison. On appeal, he contends that (1) the trial court prejudicially erred in failing to instruct the jury sua sponte pursuant to *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*); (2) defense counsel was prejudicially deficient in failing to emphasize during closing argument that the prosecution had not searched defendant's residence; (3) defense counsel was prejudicially deficient in failing to object to prosecutorial misconduct; and (4) the cumulative effect of the errors violated his right to a fair trial. We affirm.

I. Factual Background

Responding to a dispatch call, Salinas Police Sergeant Jeffrey Gibson saw a man exposing himself at an apartment complex window. Less than half an hour later, Gibson saw defendant walking down the street. Believing defendant was the man he had seen at the window, Gibson alerted other officers. Officer Gavin McVeigh arrested defendant for indecent exposure. McVeigh pat searched him for weapons and took a CD player, headphones, and $102 in cash from him before transporting him in McVeigh's patrol car to the police station. McVeigh pat searched defendant again before putting him in a holding cell and found a cell phone in the waistband of defendant's pants.

McVeigh recognized the phone, which he had forgotten to return to the previous occupant of his patrol car, a parolee he had transported to a parole search of his house. The situation at the house was chaotic. The parolee had been kept in the squad car, handcuffed and under observation, while officers searched the house, and he had not moved at all. When the parolee exited the car, McVeigh and another officer noticed the phone "underneath where he was originally located." McVeigh left it there while he completed searching the car. He found nothing else. He then released the parolee, forgetting to return the phone.

McVeigh testified that his searches of defendant in the field and at the police station—"[j]ust a standard search, you know, waistband, pockets, pants, arms, back"—did not uncover any drugs. At the police station, defendant was cursing and uncooperative, so McVeigh decided to take him directly to the county jail. He put defendant, handcuffed and shackled, into the back seat of his patrol car on the driver's side.

Defendant "became completely quiet" during the five-minute ride to the jail. He managed to unbuckle his seat belt and "he began to lay down in the back seat, with his head toward the passenger side. And his body -- you know, his feet on the driver's side.

And move around back there in the back of the patrol vehicle" down in the floorboard area. "He was squirming around the entire ride."

Deputies at the jail helped remove defendant from the patrol car, and McVeigh locked it, as standard police procedures require. When McVeigh came back out, there was no indication that anybody had gotten into the car. Before leaving the jail, McVeigh searched the back seat. This too is standard procedure, to "make sure no contraband is left behind, we didn't miss anything." It is done "every single time" somebody is transported. McVeigh found a clear plastic sandwich bag "actually sticking out, some of it protruding" from underneath the back seat. The officer riding with him said that it was clearly visible, in plain view. The bag contained 28 individually wrapped rocks of what was identified at trial as 5.45 grams, net weight, of cocaine base, also known as crack cocaine.

II. Procedural Background

Defendant was charged by information with possession of cocaine base for sale (Health & Saf. Code, § 11351.5), possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), and indecent exposure (Pen. Code, § 314.1). The information further alleged with respect to the drug counts that defendant had served two separate prison terms for prior felony convictions within the meaning of Penal Code section 667.5, subdivision (b).

At trial, the jury viewed a large tattoo on defendant's torso, and Gibson admitted he had not noticed any tattoos on the torso of the man at the apartment complex window. Testifying as an expert in the identification and classification of drugs and drugs possessed for sale, Gibson opined that the cocaine base found in McVeigh's police car was packaged and possessed for sale

The defense rested without calling any witnesses. After deliberating for just over three hours, the jury returned guilty verdicts on both drug counts but reported their

inability to agree on the indecent exposure count. The court declared a mistrial on that count and dismissed it (Pen. Code, § 1385). Defendant admitted the prison prior allegations. The trial court dismissed the simple possession count and sentenced defendant to five years in state prison. Defendant filed a timely notice of appeal.

III. Discussion

A. *Dewberry* Instruction

In *Dewberry*, the California Supreme Court reaffirmed the rule that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*Dewberry*, *supra*, 51 Cal.2d at pp. 555-557.) Here, defendant contends, and the Attorney General concedes, that the trial court erred in failing to instruct the jury sua sponte on how to proceed if it was convinced beyond a reasonable doubt that defendant possessed cocaine base, but entertained a reasonable doubt about convicting him for the greater, as opposed to the lesser included, drug offense. The parties disagree, however, on the effect of that error. Defendant claims it was prejudicial, requiring reversal under any standard. The Attorney General claims the error was not prejudicial, because (1) the trial court struck the conviction on the lesser included offense, and (2) it is not reasonably probable that defendant would have obtained a more favorable outcome had the error not occurred. We agree that the trial court erred in failing to give the referenced instruction, and we accept the Attorney General's concession.[1] (*Dewberry*, *supra*, 51 Cal.2d at p. 555.) We proceed directly to the prejudice analysis.

---

[1] We reject the Attorney General's argument that the conceded *Dewberry* error was cured when the trial court instructed the jury pursuant to CALCRIM No. 225 (Circumstantial Evidence: Intent or Mental State). That instruction did not tell the jury how to proceed if it was convinced beyond a reasonable doubt that defendant possessed

At the outset, we reject defendant's claim that the error was one of federal constitutional magnitude, requiring application of the standard announced in *Chapman v. California* (1967) 386 U.S. 18. It is settled that "in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses . . . supported by the evidence must be reviewed for prejudice exclusively under *Watson*." (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*), citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

The defendant in *Breverman* was charged with murder. The trial court instructed the jury on justifiable homicide and on the lesser "necessarily included" offenses of voluntary and involuntary manslaughter, premising the involuntary manslaughter instruction on an "'unreasonable self-defense'" theory only. (*Breverman*, *supra*, 19 Cal.4th at p. 148.) Convicted of murder, the defendant argued on appeal that the court erred in failing to instruct the jury on a "'heat of passion'" theory of voluntary manslaughter, which was also supported by the evidence. (*Ibid*.) The Court of Appeal reversed, and the California Supreme Court granted review to determine "what standard of appellate reversal should apply to an erroneous failure to instruct, *or to instruct completely*, on a lesser included offense[.]" (*Breverman*, at p. 148, italics added.)

The defendant in *Breverman* insisted, as defendant does here, that the failure to instruct sua sponte was error under the federal as well as the state Constitutions. (*Breverman*, *supra*, 19 Cal.4th at p. 165.) The California Supreme Court rejected the assertion that the error was one of federal law: "[W]e reject any implication that the alleged error at issue in this case . . . is one which arises under the United States Constitution." (*Ibid.*) The court explained that neither its prior decisions concluding that the right at issue was a constitutional one, "nor any other of our authorities before or

---

cocaine base, but entertained a reasonable doubt about convicting him for the greater, as opposed to the lesser included, drug offense.

since, specified that we were relying to any extent on *federal* constitutional principles." (*Ibid.*) Meanwhile, the court continued, "the United States Supreme Court has expressly refrained from recognizing a federal constitutional right to instructions on lesser included offenses in noncapital cases." (*Ibid.*) Declining to do "what the high court has expressly not done," the court confirmed "that the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law." (*Breverman*, at p. 169). Therefore, it held, the proper standard for analyzing any claimed prejudice from the trial court's failure to instruct *fully* on the lesser included offense of voluntary manslaughter was the *Watson* standard. (*Breverman*, at p. 178.)

Here, as in *Breverman*, the trial court failed to *fully* instruct the jury on a lesser included offense. The jury here was instructed on reasonable doubt generally (CALCRIM Nos. 103, 200) and on the elements of possession for sale (CALCRIM No. 2302) and simple possession (CALCRIM No. 2304). It was further instructed that "[i]f you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence, and another to guilt, you must accept the one that points to innocence" (CALCRIM No. 224). It was not, however, instructed on how to proceed if it entertained a reasonable doubt about convicting defendant for the greater, as opposed to the lesser included, drug offense (CALCRIM No. 3519) or told that it could not convict defendant of both possession for sale and simple possession. In fact, the jury convicted defendant of *both* offenses.

In our view, the trial court's error here was arguably less serious than the error in *Breverman*, where the court failed to instruct *at all* on one of two theories of voluntary manslaughter supported by the evidence. If the arguably more serious error in *Breverman* was properly analyzed for prejudice under *Watson*, it follows that the same standard should be applied to the error in this case. We will apply the *Watson* standard.

Under *Watson*, "[a] conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*Breverman*, *supra*, 19 Cal.4th at p. 178, quoting *Watson*, *supra*, 46 Cal.2d at p. 836.) A "more favorable outcome" in the context of this case would be a conviction for simple possession, rather than possession for sale.[2] (*Dewberry*, *supra*, 51 Cal.2d at pp. 555-556.)

Here, it is not reasonably probable that defendant would have been convicted of simple possession rather than possession for sale had the error not occurred. Our examination of the entire cause finds no evidence suggesting defendant possessed the crack cocaine for personal use. As the defense emphasized during closing argument, the evidence showed defendant "didn't have any drug habit." He was not under the influence of crack when he was arrested. He did not have a crack pipe, nor did he exhibit any physical signs of crack use.

Evidence that defendant possessed the crack cocaine for sale, on the other hand, was substantial. Expert testimony established that the cocaine base weighed approximately 5.45 grams—a "large amount" of the drug, and far more than might be used for recreational purposes. It was packaged in "28 individually wrapped bindles" with a street value of $20-40 each. The manner of packaging and the "sheer quantity" of rocks were consistent with possession for sale, since a "casual user usually only maintains a very small quantity for personal use." Gibson testified that the most he had ever seen a casual user possess was five rocks of cocaine. He explained that dealers, by

---

[2] Defendant cannot claim prejudice from the fact the jury convicted him of both the greater and the lesser included offenses because, as the Attorney General points out, the trial court recognized and properly corrected that error by dismissing the lesser offense. (*People v. Moran* (1970) 1 Cal.3d 755, 758, 763.)

contrast, generally have "a pocket full of rocks and sell individual rocks." That defendant did not have a scale in his pocket or a pay/owe sheet did not change Gibson's conclusion defendant possessed the crack cocaine for sale. As he explained, "for the most part," rock cocaine dealers do not carry scales, and the absence of a pay/owe sheet simply indicates a cash and carry business. Given the wealth of evidence that defendant was a dealer and the absence of evidence that he was a user, it is not reasonably probable that the jury would have convicted him of simple possession had the error not occurred. We conclude he was not prejudiced by the trial court's failure to give a *Dewberry* instruction.

B. Ineffective Assistance of Counsel

Defendant contends his counsel was prejudicially deficient in two respects: in failing to emphasize during closing argument that the police had not searched his residence and in failing to object when the District Attorney in his closing and rebuttal arguments "indirectly commented on [defendant's] constitutional right to remain silent post arrest and at trial." Reversal is required, defendant claims, because these errors undermined confidence in the outcome of the proceedings. We disagree.

A defendant seeking reversal for ineffective assistance of counsel must prove both deficient performance and prejudice. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland* v. *Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The first element "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Strickland,* at p. 687.) The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." (*Strickland,* at p. 690.) "Judicial scrutiny of counsel's performance must be highly deferential" and "every effort [must] be made to eliminate distorting effects of hindsight . . . ." (*Strickland,* at p. 689.) When counsel's conduct can reasonably be attributed to sound strategy, a reviewing court

will presume the conduct was the result of a competent tactical decision, and defendant must overcome that presumption to establish ineffective assistance. (*Ibid.*)

"Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland*, *supra*, 466 U.S. at p. 687.) "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (*Strickland,* at p. 694.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [¶] In making the determination whether the specified errors resulted in the required prejudice, . . . a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." (*Ibid.*)

A court deciding an ineffective assistance claim does not need to address the elements in order, or even to address both elements if the defendant makes an insufficient showing on one. (*Strickland, supra,* 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." (*Ibid.*)

1. Failure to Emphasize Absence of Search

Defendant asserts that "the fact that the police did not search [his] residence for any evidence of drug dealing activity should raise a strong inference that the police were sloppy in not searching, or they were afraid that the search would turn up nothing and harm their case." He contends that a residence search "would have produced very relevant evidence: scales, packaging materials, more drugs, pay-owe sheets, etc. to prove that [defendant] was a drug dealer, or it would have produced no such evidence, which would have strongly supported the defense theory that [defendant] did not possess the

drugs." Therefore, he argues, "[c]ounsel should have argued to the jury that by failing to seek and produce this evidence, the prosecution was trying to avoid damaging evidence." Counsel's failure to do so, defendant urges, was prejudicial because the evidence against him "was not so overwhelming that a conviction, in the absence of counsel's ineffectiveness, would have been a foregone conclusion." We are not persuaded.

The record discloses an abundance of evidence, albeit circumstantial, that the drugs could not have been left in McVeigh's patrol car by anybody other than defendant. Only two persons—first the parolee and later defendant—were in the back of McVeigh's patrol car that day. Because McVeigh was new to the force, he was under the continuous supervision of his field training officer, Christine Fairbanks. With Fairbanks watching, he thoroughly searched his patrol car, including the area where he later found the drugs, after the parolee exited it. Sergeant Gerhardstein, who had assisted with the parole search, was also watching. As Fairbanks pointed out, "if you're going to have a sergeant and a field training officer watching what you're doing, you're going to do a good job of searching a vehicle." McVeigh found the cell phone he had forgotten to return to the parolee, but nothing else.

Contrary to the defense theory, there was no evidence at all to suggest the parolee might have left the drugs in the patrol car. Although he had a lengthy record—"[w]eapons, domestic violence, and stuff that's related to gang violence"—he had never been arrested on drug charges. He was seated in back on the passenger side, not on the driver's side, where the drugs were later found, and either Fairbanks or Gerhardstein was watching him the entire time, "making sure he wasn't doing anything odd in the back seat." He did not move in the seat, or access the area where the drugs were later found.

That no drugs were found on defendant does not mean the drugs could not have been his. As McVeigh explained, he did not pat search the area around defendant's genitals and therefore would not have uncovered any drugs that might have been secreted there. At no time did he take defendant's trousers down, and defendant was not strip

searched at all that day. Gibson testified that it is "common" for people to hide drugs in places they feel police officers might be reluctant to pat search, and he recalled "maybe five" times when he had found something—a knife, narcotics, narcotics paraphernalia—that an arrestee had slipped into his patrol car *after* having been pat searched. Fairbanks testified that she too had found contraband left in a police vehicle after people she had pat searched were taken out of it. This was not because the search was sloppy but because, "unfortunately, a lot of people hide things in interesting places in this town. Unless you're going to do a very, very thorough search, you're not going to find it."

McVeigh found the cocaine base after transporting defendant from the police station to the jail. That was the trip defendant had spent "mov[ing] around back there in the back of the patrol vehicle" down in the floorboard area. Although handcuffed, he managed to unbuckle his seat belt—not an unusual occurrence, as Fairbanks testified—and "he was squirming around the entire ride." When deputies from the jail took defendant out of the patrol car, McVeigh locked it before following them into the jail. When he came back out, the car was still locked, and there was no indication that anybody had gotten into it.

Given the wealth of evidence that the drugs were left by defendant and the absence of evidence that they were left by anybody else, we cannot fathom a strategically sound reason for emphasizing during closing argument that police had not searched defendant's residence. The jury was certainly aware that the police had not done so. In cross-examining Gibson, defense counsel highlighted the fact that there had been no search. He asked Gibson if he had "had occasion to search defendant's house," and, when Gibson replied that he had not, asked whether he would "have liked to search his house . . . ." The court sustained a relevance objection to the latter question. Counsel returned to the subject at the end of his re-cross-examination of Gibson, stating, "All I want to be clear about is that you had opportunities, I imagine, to search beside [defendant's] person, any residence that he was associated with, any place he might have kept his possessions, and

you didn't find any paraphernalia, scales or anything of that nature there, did you?" When Gibson replied that "[n]o search of that nature took place," defense counsel repeated, "Okay. No search took place." In our view, counsel could reasonably have decided that there was nothing to be gained by further emphasizing the lack of a residence search, particularly since defendant in fact had no "house" or residence but was instead homeless, and it was entirely speculative what the police might or might not have found had they searched the Maple Street residence of the friend defendant only "sometimes" stayed with.

Instead of belaboring the residence search point, defense counsel could reasonably have made a tactical decision to focus his closing argument on the broader defense theories of the case: that the rock cocaine found in McVeigh's patrol car was put there by someone other than defendant and that "policemen make mistakes too." Counsel emphasized that nobody saw defendant with the drugs, that the evidence against him was entirely circumstantial, and that "it would be virtually impossible for . . . anybody . . . except a contortionist to do what's claimed here." He repeatedly referred to McVeigh's trainee status and to "sloppy police work" in general—"not dishonest police work, not lies, not cover-ups or planting drugs, but sloppy police work"—before returning to the theme that the drugs were not defendant's: "Think about the logic of it. Think about the sequence of events. Think about having seen the back of that squad car, how possible it would be for someone shackled, hand and foot, to transfer drugs from some hidden part of his body to a part of that squad car." That the jury returned guilty verdicts does not mean defense counsel's performance was deficient. We find no deficiency in counsel's performance here.

2. Prosecutorial Misconduct

Defendant contends his counsel was prejudicially deficient in failing to object to three instances of prosecutorial misconduct that occurred during closing argument when

the prosecutor "indirectly" criticized him for exercising his constitutional rights (1) to remain silent after arrest, (2) to be tried by a jury, and (3) to remain silent at trial.

Defendant asserts that the first claimed instance of misconduct occurred at the start of closing arguments, when the District Attorney stated that "'[t]his case really is about a defendant who doesn't want to take responsibility for his criminal acts. Plain and simple.'" Defendant argues that this remark violated *Doyle v. Ohio* (1976) 426 U.S. 610 by "criticizing [him] for remaining silent after his arrest and not taking 'responsibility for his criminal acts.'" We are not persuaded.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) "When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] Moreover, prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

Here, we perceive no reasonable likelihood that the jury would have construed or applied the complained-of remark in an objectionable fashion. In our view, it cannot reasonably be interpreted to refer, even indirectly, to defendant's decision to remain silent after his arrest. We agree with the Attorney General that the comment was no more than a lead-in to the District Attorney's next statement: that defendant was "either the

unluckiest person in the world, or the guiltiest." That sentence, rather than the challenged one, summarized the parties' respective positions: the People contended defendant was indisputably guilty, while the defense contended the police "got the wrong man." In the argument that followed, the District Attorney urged the jury to find defendant guilty because, on the evidence presented, it would be completely implausible for events to have unfolded in any way other than the People had suggested. We see no reference, either express or implied, to defendant's post-*Miranda* silence. The predicate for *Doyle* error—the use of a defendant's post-*Miranda* silence—is therefore missing. Because the challenged remark was not inappropriate, defense counsel did not render ineffective assistance by failing to object to it.

Defendant claims that the second instance of misconduct arose out of the same "doesn't want to take responsibility for his criminal acts" comment, which he argues can alternatively be interpreted as criticizing him for "pleading not guilty and insisting on a trial" instead of taking responsibility for his criminal acts. We disagree.

In our view, the remark cannot reasonably be interpreted to refer, even indirectly, to defendant's decision to invoke his right to a jury trial. It is therefore easily distinguished from the prosecutorial statements the court criticized as "outrageous" in *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006 (*Zant*), the only case on which defendant relies. In one such statement (which, unlike the challenged comment here, specifically mentioned the jury) the prosecutor in *Zant* said, "It's offensive for me to sit here . . . to be in this courtroom . . . when a man sits up here and tries to mislead you . . . into believing he's not guilty. That's offensive, to me. That's trifling with the processes of this court." (*Zant*, at p. 1019, fn. 22.) That statement, the *Zant* court said in dictum, "improperly implied that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial." (*Zant*, at p. 1019.)

The challenged statement here, by contrast, does not mention the jury. It says nothing about defendant's right to a jury trial. It says nothing, expressly or impliedly,

about our legal system at all. In our view, a reasonable juror would have taken the challenged statement as a general comment on the state of the evidence, especially since the District Attorney immediately launched into a summary of the evidence the People argued conclusively demonstrated defendant's guilt. We perceive no reasonable likelihood that the jury would have construed or applied the challenged statement in an objectionable fashion here. It follows that defense counsel did not render ineffective assistance in failing to object to it.

Defendant contends the third instance of prosecutorial misconduct occurred when the District Attorney "[i]ndirectly" commented on defendant's constitutional right to remain silent at trial by "mak[ing] multiple comments about counsel declining to explain how the drugs got in the patrol car." We disagree.

In *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), the United States Supreme Court held that the Fifth Amendment prohibits a prosecutor from commenting, either directly or indirectly, upon a defendant's failure to testify in his own defense. (*Griffin*, at p. 613.) Though a prosecutor is not prohibited from commenting upon testimony or evidence presented at trial, it is *Griffin* error "for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." (*People v. Hughes* (2002) 27 Cal.4th 287, 371 (*Hughes*).) In reviewing a defendant's claim of *Griffin* error, we examine whether there is a reasonable likelihood that the jury understood the remarks, in context, to be a comment on the defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

Defendant first challenges the District Attorney's statement at closing argument that "[d]efense counsel offered no explanation by way of testimony from a doctor, for instance, saying that [defendant] has epilepsy or another favorite, attention deficit disorder. He bounces around. Nothing like that. Nothing was given that says why he did that." Defendant asserts that this comment "was tantamount to impermissibly

commenting on [him] invoking his constitutional right not to testify . . . .” since “the only person who could have explained why [he] was squirming around was [defendant] himself.” We cannot agree. The challenged statement expressly referred to the defense’s failure to present testimony *from a doctor* to explain defendant’s conduct. It says nothing about *defendant’s* failure to testify, “nor is the remark susceptible of such interpretation by reference or innuendo.” (*People v. Bethea* (1971) 18 Cal.App.3d 930, 936 [remark that “there has been no explanation given for this” was proper commentary on the state of the evidence]; *Hughes*, *supra*, 27 Cal.4th at p. 373 [statements that “ ‘[t]he defense has called no witness that could testify that this is what he drank or how much he drank’ ” and “ ‘there has been no evidence that [defendant] ingested any cocaine that day’ ” held proper “comment on the general state of the evidence, rather than an assertion that the prosecution’s evidence was not contradicted by defendant personally”].) We conclude that the District Attorney’s statement was a permissible comment on the evidence. Therefore, defense counsel did not render ineffective assistance in failing to object to it.

Defendant next challenges what he characterizes as the District Attorney’s effort during rebuttal argument to “convince[] the jury” that certain evidence was uncontradicted or unrefuted. The District Attorney’s remarks constituted *Griffin* error, defendant asserts, because the only person who could possibly contradict or refute the evidence was defendant himself. Again, we cannot agree.

The District Attorney told the jury: “I invited Mr. Kaman [defense counsel] to explain the movement in the back of the car and he declined. He rightfully explained to you that I have the burden. He doesn’t have to prove anything. And he’s exactly correct. He doesn’t. [¶] It was an invitation I made to you to suggest to you how in the world could they have got in there if it weren’t for his client in a locked cage, essentially. It’s not there before he’s there. He’s locked in the cage, but then it’s there after he’s there. Then you have the movement and fidgeting. He declined because there isn’t an explanation other than he put them there. There is just no explanation at all, reasonable

or otherwise. [¶] He's the only person in that car when --when the drugs went in. The police don't have to see him do it."

A moment later, the District Attorney told the jury: "And as I say, you know, the invitation to explain how those drugs possibly could have gotten there, any reasonable doubt, raise any reasonable doubt, was declined. Mr. Kaman [defense counsel] argued it's not his burden. But there isn't any reasonable doubt. This is -- there is no possible way the drugs could have got in the car other than [defendant]. [¶] Defense counsel mentioned he pulled the drugs out of an area he already searched twice. Hands at his lower back here, plenty of places where somebody might be able to reach in, have some drugs, move around with their hands and pull drugs out. [¶] Mr. Kaman [defense counsel] mentioned, he said there were too many possible explanations. And I put that in quotes. But he failed to give you any of them. He didn't tell you any of the possible explanations. [¶] Now, he doesn't have to. What are they? Give us something. I mean, give us something that says, well, you know, that could have been that. He doesn't. He doesn't give us anything of the sort. No other plausible explanation, no other reasonable explanation of how the dope got in that car."

In *Hughes*, the California Supreme Court held that remarks analogous to those defendant challenges here were "fair comments on the evidence and the relative weight that the jury should assign to it." (*Hughes*, *supra*, 27 Cal.4th at p. 374.) During closing argument in *Hughes*, the prosecutor asked the jury, "'Where is there a single piece of evidence that . . . something snapped because they were surprised at [seeing] each other [in the apartment]? Where is there evidence of that? *Where is there a witness to testify to that*? Where is there a piece of physical evidence to suggest that?'" (*Hughes*, at p. 373.) The prosecutor argued that "'[t]here is no rational alternative explanation that has been offered by the defense evidence in this case . . . .'" (*Hughes*, at p. 374, fn. 20.) He pointed out that "'[t]he defense has called no witness that could testify that this is what he drank or how much he drank,'" and "'there has been no evidence that [defendant]

ingested cocaine that day.'" (*Hughes*, at p. 373.) The court held that because none of these statements, in context, could reasonably have been understood as comments on the defendant's failure to testify, none of them violated *Griffin*. (*Hughes*, at pp. 372- 375.) We reach the same conclusion here. Because there is no reasonable likelihood that the jury understood the District Attorney's remarks, in context, to be a comment on defendant's failure to testify, defendant's claims of *Griffin* error fail. Because the District Attorney's remarks were proper comments on the state of the evidence, defense counsel did not render ineffective assistance in failing to object to them.

C. Cumulative Prejudice

Defendant contends that the cumulative effect of the errors violated his constitutional right to a fair trial. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Hill*, *supra*, 17 Cal.4th at p. 844.) Here, however, there was only one error, and that error was harmless. We reject defendant's claim of cumulative prejudice.

IV. Disposition

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P. J.

_____
McAdams, J.